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IN THE

Supreme Court of the United States

RAYMOND ABRAMS, NICOLE B. SILBERKLEIT, JANET HERMAN, LILY REDNER, BERNARD CARON, ERNEST HAAR, HARRY CYBULSKI, YVONNE LITMAN, CASSANDRA KIRBY CONAHAY FREUND, JEAN-JACQUES FRAENKEL, LILIANE LICHTENSTEIN and MARIE WEINRAUCH,

Petitioners,

v.

SOCIETE NATIONALE DES CHEMINS DE FER FRANCAIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

STEPHEN T. RODD*
ABBEY GARDY, LLP
212 East 39th Street
New York, NY 10016
(212) 889-3700

HARRIET TAMEN
HURT, LEVINE & PAPADAKIS
405 Park Avenue, 15th Floor
New York, NY 10022
(212) 583-1453

* *Counsel of Record*

Attorneys for Petitioners

(Additional Counsel Listed on Inside Cover)

PROFESSOR LUCILLE A. ROUSSIN
BENJAMIN N. CARDOZO
SCHOOL OF LAW
55 Fifth Avenue
New York, NY 10003
(212) 790-9746

Of Counsel:

GREGORY L. TESORO
405 Park Avenue, 15th Floor
New York, NY 10022
(212) 935-0900

Attorneys for Petitioners

PARTIES TO THE PROCEEDINGS

The parties to the proceeding were set forth at page ii of the Petition for a Writ of Certiorari, and there are no amendments to that statement.

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INTRODUCTION

The holding of the Second Circuit that this case is precluded by *Republic of Austria v. Altmann*, 541 U.S. 677, 124 S. Ct. 2240 (2004), is inconsistent with the reasoning of this Court in *Altmann*. In that decision, this Court held that the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. §§ 1330, 1602-11, may be applied retroactively to sovereign governments in so far as it makes available a United States forum for legal action against a foreign sovereign for expropriation of property. That holding turns upon the fact that the foreign government enjoyed no settled expectation in avoiding suit in a particular forum through a defense of sovereign immunity. This Court stressed the "narrowness" of its decision in *Altmann,* 124 S. Ct. at 2254. *Altmann* does not bar this lawsuit against a separate corporate entity for war crimes for which plaintiffs have no other forum. The ruling in *Altmann* reached only the question of expanding the available fora for a cause of action, not the closing of the only available forum for a pre-existing cause of action.

The position of the Second Circuit, in rejecting any review of the settled rights of plaintiffs, is in direct opposition to that of the Third and Ninth Circuits, which do consider such rights in any analysis of the retroactive reach of a statute. Review by this Court is warranted to resolve this conflict.

By granting the Petition for Certiorari, this Court will provide a uniform determination of retroactivity in cases involving settled expectations of plaintiffs, without disturbing the holding in *Altmann*, which addressed only the expectations of sovereign states. This Court should also grant certiorari to clarify whether, or the extent to which, "jurisdiction-ousting" statutes are subject to the retroactivity analysis set forth in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994).

ARGUMENT

I. The Second Circuit and the Respondent Have Misconstrued the Reasoning of *Altmann*.

SNCF in its opposition to the Petition ignores the first four sections of *Altmann*, especially Section IV, in which this Court sets forth its reasoning supporting the retroactivity analysis expounded in *Landgraf*. In that Section, which deals specifically with the vitality of *Landgraf*, this Court goes to great lengths to explain why *Landgraf* does not provide a resolution in *Altmann*. The Court's finding is that sovereign states had no settled expectations of immunity and, therefore, an analysis framed in terms of settled rights, the foundation of the retroactivity analysis set forth in *Landgraf*, did not provide an answer in that case. *See Altmann*, 124 S. Ct. at 2251.

SNCF argues that, should the Court in this case apply *Landgraf*, it would find that the FSIA had no retroactive effect because (a) the FSIA did not alter the immunity of SNCF and (b) the presumption against retroactive effect does not apply when a claim is eliminated by statute, as opposed to a claim thereby being created. The former is simply wrong, as is shown in the Petition for Certiorari. *See* Pet. at 8-9, *see also infra* at Point II. The latter SNCF couches in terms of the proposition, often debated before this Court, that the retroactive effect of a statute should be ignored if the statute is "jurisdiction-ousting" rather than "jurisdiction-granting." Opp. at 12. Yet SNCF is unable to cite any case that held that jurisdiction-ousting statutes that closed all possible legal recourse in all fora were not impermissibly retroactive. Petitioners are unaware of any case in which this Court ever held that a "jurisdiction-ousting statute" that closed all possibility of any legal redress was not impermissibly retroactive. Cases cited by Petitioners such as *Mathews v. Kidder Peabody & Co.*, 161 F.3d 156 (3d Cir. 1998), and *Scott v. Boos*, 215 F.3d 940 (9th Cir. 2000), specifically found that a statute that eliminated an existing cause of action was impermissibly retroactive.

SNCF begins its opposition to the Petition by citing this Court's analysis of the "henceforth" clause of the FSIA preamble. Opp. at 4-5. Such analysis was not, as SNCF implies, the beginning of this Court's reasoning nor its sole analytical tool. It was only after the Court determined that the *Landgraf* analysis did not conclusively support the anti-

retroactivity presumption that the Court looked at the language of the statute.

The Court conceded that the text of the FSIA "falls short of an 'express prescription of the statute's proper reach.'" *Altmann,* 124 S. Ct. at 2251 (citation omitted). Had it found otherwise, the preceding portion of the decision analyzing the expectations of sovereign states under a *Landgraf* analysis would have been unnecessary. Instead, the Court recognized the presumption against retroactivity, found that an analysis of reliance interests of sovereign states was not dispositive, and then looked at the language of the statute to see if there was anything to overcome the presumption. *See id.* at 2250-54. In this case, an appropriate analysis of reliance interests would allow this action to go forward.

Respondent's presumption that "all nine Justices of this Court agreed [in *Altmann*] that nothing in the *Landgraf* doctrine would preclude recognition of immunity under the FSIA for an entity such as SNCF," Opp. at 12, is baseless. This Court in *Altmann* found only that *Landgraf* did not provide an answer where the expectations of a sovereign state were at issue. The analysis in *Altmann* has no applicability to a case in which a separate corporation such as SNCF, which is not a sovereign state, seeks a determination that sovereign immunity should be accorded to it for its conduct prior to 1976.

SNCF treats lightly the presumption against retroactivity. Opp. at 10. However, such a presumption is "a principle in the English common law, as ancient as the law itself, that a statute, even of its omnipotent parliament, is not to have a retrospective effect.'" *Altmann*, 124 S. Ct. at 2264 (Kennedy, J. dissenting) (citing *Dash v. Van Kleeck*, 7 Johns. 477, 503 (N.Y. 1811)). It is a presumption with legal and historical foundations and to which this Court has appended specific rules to guide its application. This Court did not dismiss the presumption against retroactivity. Any analysis of the retroactivity of the FSIA requires an analysis of the reliance interests of the parties. In *Altmann*, this Court concluded that such an analysis was not determinative. In this case, it is.

II. Petitioners Have Always Had the Right to Legal Redress Against SNCF.

Prior to the FSIA, SNCF was amenable to suit in the United States. Although SNCF argues that it would have been entitled to immunity, Opp. at 5, such a position ignores the facts and the law. SNCF was repeatedly sued in United States courts prior to the enactment of the FSIA, *see* Pet. at 8 n.7, and until this case, never raised the affirmative defense of sovereign immunity. As in this case, plaintiffs in those cases sought redress in the United States for injuries sustained by SNCF's commercial activities in France.

SNCF attempts to dismiss these facts and its own litigation history as "inherently incredible." Opp. at 13. SNCF would have this Court assume that it chose not to assert an available defense such as sovereign immunity, but instead willingly litigated suit after suit – with the attendant legal fees and awards. Such a position is also inherently incredible.

Discovery furnished by SNCF established that neither the government of France nor SNCF ever invoked the defense of sovereign immunity in any of the cases in which SNCF was sued in United States courts before enactment of the FSIA. SNCF has confirmed that it has no documentation reflecting any communications with the State Department by SNCF, the government of France or any other person, government or entity on the subject of sovereign immunity. Thus, any assertion by SNCF that it would have been entitled to immunity prior to 1976 is rank speculation.

SNCF's attempt to cloak itself with the mantle of absolute immunity is equally flawed. SNCF's "well-known fact" regarding the applicability of absolute immunity, Opp. at 5, is not a fact at all. The doctrine was available only to sovereigns themselves, not to separate corporate entities whose shares happened to be owned by a government. *See e.g. United States v. Deutsches Kalisyndikat Gesellschaft*, 31 F.2d 199, 202 (S.D.N.Y. 1929); *Coale v. Société Co-operative Suisse des Charbons*, 21 F.2d 180, 181 (S.D.N.Y. 1921). SNCF

also denies more than 150 years of American jurisprudence regarding the lack of immunity for separate entities.[1] SNCF has been unable to cite a single case where a separate corporate entity owned by a government was granted immunity. Plaintiffs have cited numerous cases where separate corporate entities were denied immunity. *See* Pet. at 9.

Furthermore, in *Altmann*, no issue of the expectations of separate entities was before this Court. This Court reviewed only the expectations and reliance interests of a sovereign defendant, finding that expectations based on the fluid doctrine of comity did not rise to the level of settled expectations. It did not review, nor reject, an analysis of the settled expectations of plaintiffs.

The Second Circuit, however, reluctantly concluded that retroactivity that impairs plaintiffs' rights was sanctioned by this Court in *Altmann*. But such an approach, which essentially assumes that defendants' rights are of greater value than those of plaintiffs or do not even have to be considered in determining whether a statute is impermissibly retroactive, has no support in *Altmann*. Moreover, it contradicts the positions of the Third and Ninth Circuits, and merits review by this Court for that reason alone. *See* Pet. at 10.

III. The Department of State's Letter Brief to the Second Circuit Is Not Persuasive.

Although SNCF cites the letter brief from the Department of State at great length, Opp. at 5-6, Opp.

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[1] Nor do the cases cited by SNCF support its argument. For example, *Berizzi Brothers Co. v. The Pesaro,* 271 U.S. 562 (1926), concerned a vessel owned, possessed, operated and controlled directly by the Italian government. Similarly, in *Ex Parte Republic of Peru,* 318 U.S. 578 (1943), the ship was also owned directly by the Government of Peru, which submitted a formal request for immunity to the State Department. And in *Compañia Española de Navegacion Maritima, S.A. v. The Navemar*, 303 U.S. 68 (1938), the Navemar was a public vessel of the Republic of Spain. None of these cases involved a separate corporation engaged in commercial activities, such as SNCF.

Appendix at 1a, Petitioners submit that the Department of State's letter brief is inaccurate and misleading. Petitioners also note that the Department of State's position as an *amicus curiae* in *Altmann* was that the FSIA ought not to apply to pre-FSIA conduct, pointing out that the "FSIA is subject to established retroactivity principles," such as those set forth in *Landgraf*. *See* Brief for the United States as *Amicus Curiae* at 9, *Republic of Austria v. Altmann*, 541 U.S. 677, 124 S. Ct. 2240 (2004) (No. 03-13). Petitioners agree.

Both the Department of State and SNCF rely on the same flawed view of *Dole Food Co. v. Patrickson*, 538 US. 468 (2003). *Dole* did not consider, or hold, anything regarding the retroactive application of the FSIA or any part of it, to conduct occurring before enactment of the statute. The facts of *Dole* make it singularly ill-suited to the extraction of some sort of rule regarding the application of the FSIA to SNCF's conduct during World War II.

Furthermore, the Department of State is incorrect when it states that *Altmann* requires that separate entities be lumped with sovereign states because that is Congress's "current judgment" (Opp. Appendix at 7a). Such a statement does not address the issue of whether Congress intended that the FSIA apply retroactively to separate entities to create immunity that did not exist prior to the passage of the FSIA. In the *sui generis* context of *Altmann*, 124 S. Ct. at 2252, this Court did not address the retroactivity of the FSIA to separate entities, and the law applicable to separate entities does not lead to the conclusion that the FSIA should apply retroactively to claims against such entities for their pre-FSIA conduct.

CONCLUSION

The Second Circuit did not properly apply the holding of *Altmann* to the case at bar. This Court in *Altmann* found only that *Landgraf* did not provide an answer where the expectations of a sovereign state were at issue. The reason for this is that sovereign states, unlike private parties such as corporations engaged in commercially activity, had no settled expectation of

sovereign immunity because that doctrine was subject to continued change based on contemporary political realities. Nor did *Altmann* analyze the effect of extinguishing all claims of plaintiffs against a separate corporate entity whose shares are owned by a foreign government. In short, the analysis in *Altmann* does not control where a separate corporation such as SNCF, which is not a sovereign state, seeks a determination that sovereign immunity should be accorded to it for its actionable conduct prior to 1976.

Although SNCF contends that there is no basis for distinguishing between corporations and governments, Opp. at 7, almost 200 years of judicial history invalidates such an argument. Separate entities were always considered private parties, and plaintiffs always had the right to sue them in United States courts. In *McGrath v. Manufacturers Trust Co.*, 338 U.S. 241, 250 n.12 (1949), this Court itself recognized such a distinction, pointing out the differences "between the liabilities of foreign public or semipublic corporations and those of the foreign government to which they are related."

The FSIA was not a retroactive immunization of separate entities for their acts committed before 1976, and nothing in *Altmann* requires such a reading. *Altmann* itself leaves open an inquiry into the expectations of both plaintiffs and defendants in cases not involving sovereign governments themselves, and *Dole* deals with the status of governmental instrumentalities, not the retroactivity of their challenged behavior to a time pre-dating the statute. Nothing about the FSIA, neither text, intention nor common sense, leads to the conclusion that Congress intended to allow newly-defined instrumentalities to escape the consequences of their actions.

There is nothing in *Altmann* that requires the settled expectations of plaintiffs to be disregarded. Due process and elementary considerations of fairness mandate that the rights of plaintiffs be considered as well as those of defendants in considering the retrospective reach of a statute. Nothing in *Altmann* requires otherwise. Thus, SNCF is not entitled to the retroactive protection of the FSIA, and United States courts

should hear this case against SNCF for its commission of war crimes during World War II.

For the reasons set forth in the Petition for Certiorari and in this reply, Petitioners respectfully request that review by this Court be granted.

Respectfully submitted,

STEPHEN T. RODD, ESQ.*
ABBEY GARDY, LLP
212 East 39th Street
New York, New York 10016
(212) 889-3700

HARRIET TAMEN, ESQ.
HURT, LEVINE & PAPADAKIS
405 Park Avenue, 15th Floor
New York, New York 10022
(212) 583-1453

PROFESSOR LUCILLE A. ROUSSIN
Benjamin Cardozo School of Law
55 Fifth Avenue
New York, New York 10003
(212) 790-9746

Of Counsel:

GREGORY L. TESORO, ESQ.
405 Park Avenue, 15th Floor
New York, New York, 10022
(212) 935-0900

Attorneys for Petitioners

* *Counsel of Record*